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IN THE

Supreme Court of the United States

October Term, 1940

No. 407

MONTGOMERY WARD & CO., INCORPORATED,
Petitioner,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Montgomery Ward & Co., Incorporated, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on July 17, 1940, affirming a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dated December 13, 1939.

Summary Statement of the Matter Involved

The petitioner, as an employer of labor engaged in the business of selling general merchandise through mail order houses and retail stores (R. 4, 47), refused to obey a subpoena *duces tecum* of the Administrator of the Wage and Hour Division of the United States Department of Labor calling for the production of personnel records containing information as to the hours of labor and wages of some 2,000 employees of the petitioner's Kansas City, Missouri, mail order house (R. 43, 172). The refusal was conditioned by an expressed willingness to permit inspection of, or to produce, all records relating to any employee or class of employee as to which the Wage and Hour Administrator had reasonable cause to suspect that a violation of the Fair Labor Standards Act of 1938 (Footnote 1) might have occurred (R. 72-73, 82-83, 103-104).

The Administrator issued the subpoena not in aid of any quasi-legislative, fact-finding, or rule-making power, nor in aid of any quasi-judicial proceeding, but sought it solely as a law-enforcement officer engaged in policing the Fair Labor Standards Act (R. 3). The Administrator did not profess to be investigating an entire industry, but was suspicious of the petitioner as a single employer of labor (R. 4).

The subpoena *duces tecum* was not directed solely at records required by law to be kept, but included records not covered by the requirements of the Act or the regulations thereunder (R. 43, 25-27). The subpoena was not directed solely to records of hours and wages of employees engaged in interstate commerce or covered by the statute, but included records pertaining to many employees engaged solely in local, intrastate activities or

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Footnote 1: 52 Stat. 1060, 29 U. S. C. 201, et seq.

activities specifically exempted from the coverage of the Act (R. 43, 172-173). The subpoena was directed to records kept and used by the petitioner in the normal course of its business as a retailer of general merchandise (R. 175-176).

Upon the petitioner's refusal to obey the subpoena *duces tecum*, the Administrator applied to the United States District Court for an order of enforcement (R. 2-9), under Section 9 of the Federal Trade Commission Act of 1914 (Footnote 2) which reads in part as follows:

> "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person issue an order requiring such corporation or other person to * * * produce documentary evidence if so ordered. * * * "

This section of the Federal Trade Commission Act was invoked because of Section 9 of the Fair Labor Standards Act (Footnote 3), which reads in part as follows:

> "For the purpose of any hearing or investigation provided for in this Act, the provisions of section 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act * * * are hereby made applicable to the jurisdiction, powers, and duties of the Administrator. * * * "

Although the petitioner denied (R. 48) the Administrator's allegation (R. 4) that he had grounds to suspect the petitioner of a violation of law, the District Court refused to require the Administrator to produce any proof that his demand for production of papers was based on any probable cause to suspect that the records demanded contained evidence of a violation of law, or on any probable

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Footnote 2: 38 Stat. 722, 15 U. S. C. 49.

Footnote 3: 52 Stat. 1065, U. S. C. 209.

cause to suspect that a violation of law had occurred as to which the records demanded might be relevant (R. 159). The District Court ordered obedience to the subpoena without taking any evidence (R. 226-229).

The District Court was affirmed in its position by the Circuit Court of Appeals, which held that the Administrator had the right to compel the subjection of the records of an employer of labor to what the Administrator characterized as "routine" inspections, and that such inspections could be ordered:

> "* * * regardless of whether there is any pre-existing probable cause for believing that there has been a violation of the law." (R. 257).

Opinions of the Courts Below:

The opinion (R. 246) of the Circuit Court of Appeals is not yet reported. The opinion of the District Court (R. 215) is reported at 30 Fed. Supp. 360.

Grounds on Which Jurisdiction of This Court Is Invoked:

a. Basis for jurisdiction of this Court.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 *Stats.* 938 (28 *U. S. C.* Secs. 347 (a)).

b. The Statutes Involved.

The case originated in the United States District Court under Section 9 of the Federal Trade Commission Act, (Act of Sept. 26, 1914, c. 311, Section 9, 38 *Stat.* 722; 15 *U. S. C.* Sec. 49) associated by reference to the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Sections 1-19, 52 *Stat.* 1060-1069; 29 *U. S. C.* Sections 201-219) by Section 9 of the Fair Labor Standards Act (Act

of June 25, 1938, c. 676, Section 9, 52 *Stat.* 1065, 29 *U. S. C.* Section 209, Sections 9 and 10 of the Federal Trade Commission Act and the entire Fair Labor Standards Act of 1938 are set out in the appendix.

c. Date of the Order to be Reviewed.

The order of the Circuit Court of Appeals affirming the order of the District Court was entered July 17, 1940. This petition for Writ of Certiorari and supporting transcript of record are filed in this Court within three months from July 17, 1940, on SEP 9 1940

Questions Presented.

1. Do Sections 9 and 10 of the Federal Trade Commission Act as made applicable to the powers of the Administrator of the Wage and Hour Division by Section 9 of the Fair Labor Standards Act authorize the Administrator, in the course of routine inspections made to police the Act, to compel production for his inspection of all records and papers of an employer in interstate commerce containing information as to wages paid to, hours worked by, and hours scheduled to be worked by, the employees of such employer?

2. May the Congress, under the Fourth Amendment, validly grant power to a law enforcement officer to compel the production of the private records of an interstate mercantile business, in connection with routine inspections made to secure enforcement of a law without requiring the law enforcement officer to show that he has probable cause for suspecting that such records contain evidence of a violation of the law sought to be enforced?

3. Has the Administrator of the Wage and Hour Division, in the course of his performance of the duty of

policing the Fair Labor Standards Act, the power to compel the production of any records of an employer in the absence of a showing that such records relate to matters covered by the Act or to hours worked by, or wages paid to, employees covered by the Act?

Reasons Relied on for the Allowance of the Writ.

1. In holding that the Administrator of the Wage and Hour Division of the Department of Labor, in connection with his duty to police the Fair Labor Standards Act, has the statutory right to inspect at will all the records kept by an employer in interstate commerce which contain wage and hour information, the Circuit Court of Appeals has decided a question of Federal law of importance both to the Administrator in his enforcement of the Fair Labor Standards Act and the thousands of employers subject to it in the conduct of their businesses.

2. In interpreting Section 9 of the Federal Trade Commission Act as authorizing the enforcement of a subpoena *duces tecum* in the absence of any showing that the papers and records covered contained "evidence" material to a specific offense reasonably suspected, the Circuit Court of Appeals has interpreted the section in a manner conflicting with the interpretation given it by this Court and by other courts in *Fed Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, in *Fed. Tr. Com.* v. *Baltimore Grain Co.* (D.C., Md.), 284 Fed. 886 (affirmed by memorandum, 267 U. S. 586), in *Fed. Tr. Com.* v. *Claire Furnace Co.*, 274 U. S. 160, in *Fed. Tr. Com.* v. *Maynard Coal Co.* (C. of A., D. of C.), 32 Fed. (2d) 873, and in *Fed. Tr. Com.* v. *Smith* (D. C. S. D., N. Y.), 34 Fed. (2d) 323.

3. In failing to read into the applicable statute the requirement of the Fourth Amendment that probable

cause for the issuance of the writ be shown, the Circuit Court of Appeals has rendered a decision in conflict with *Schencks* v. *U. S.* (C. of A., D. of C.), 2 Fed. (2d) 185, *Wagner* v. *U. S.* (8th Cir.), 8 Fed. (2d) 581, and *Woods* v. *U. S.*, (4th Cir.), 279 Fed. 706.

4. In holding that the Fourth Amendment does not prohibit a grant of power to a law enforcement officer to compel the production of the private records of a merchandising business in connection with a routine inspection, the Circuit Court of Appeals has decided an important point of Federal Constitutional law in a manner which conflicts with prior decisions of this and other Courts, including *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, *Garske* v. *U. S.* (8th Cir.), 1 Fed. (2d) 621, *U. S. v. Lefkowitz,* 285 U. S. 452, and *Gouled* v. *U. S.*, 255 U. S. 298.

5. In holding that the records of any business which so affects the national public interest in interstate commerce as to be subject to regulation under the commerce clause thereby cease to be private papers and become public property outside the protection of the Fourth Amendment, the Circuit Court of Appeals has decided a point of Federal Constitutional law in a manner which conflicts with the prior decision of this Court in *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298.

6. In holding that a law enforcement officer may compel the production of the private records of a business without showing that they relate to the subject matter of the law which he seeks to enforce or to activities within the commerce clause, the Circuit Court of Appeals has rendered a decision in conflict with the prior decisions of this Court in *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298 and *Fed. Tr. Com.* v. *Claire Furnace Co.*, 274 U. S. 160.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings before it in the case numbered and entitled on its docket Number 7213, "Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner-Appellee, vs. Montgomery Ward & Co., Incorporated, Respondent-Appellant", to the end that the judgment herein of that court may be reviewed and reversed by this Court.

MONTGOMERY WARD & CO., INCORPORATED
Petitioner,

By STUART S. BALL,
Counsel for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case

Only one point made in the statement in the petition of the matter involved (which statement is adopted as a part of this brief) requires further amplification.

The opinion of the Circuit Court of Appeals speaks at great length (R. 250-252) of the various duties and functions imposed upon the Administrator by the Act, including:

a. The duty to recommend further legislation concerning wages and hours to Congress (Sec. 4).
b. The duty to appoint an industry committee to investigate an industry and to establish maximum hour and minimum wage standards for it (Sections 5 and 8).
c. The power to investigate an industry to gather data concerning it (Section 11(a), first clause).
d. The duty to define and delimit by regulation various exemptions from the provisions of the Act (Section 13) and various special applications of it (Section 14).

None of these duties and powers were the basis for the subpoena *duces tecum* issued against this petitioner. This subpoena was issued simply in connection with the Administrator's power to police the Act—a power defined by the second clause of Section 11(a) of the Act —the power to

> "* * * enter and inspect such places and such records * * * and investigate such facts * * * as he may deem necessary or appropriate to determine whether *any person* has violated any provision of this act, or which may aid in the enforcement of the provisions of this act." (Italics added)

This is the statutory power invoked by the Administrator in his application to the District Court (R. 3), where he professed that he wished to investigate these records because he believed the petitioner was violating the Act (R. 4 and 5). He nowhere alleged that his demand is made in connection with an investigation of an industry, or even that he suspected others of violating the Act and was making a general check-up.

The language of the opinion confuses the various functions of the Administrator, and often speaks of the investigation involved as an investigation of an "industry".

The real issues in the present case are obscured unless it be clearly understood that the question is simply as to the extent to which a law enforcement or policing agency, comparable in function to the Federal Bureau of Investigation or a local police officer, has been or may be given the power to compel scrutiny of the private records of a business in the absence of a showing of probable cause to suspect a violation of law.

If the Administrator can be given such a power, any law enforcement officer can be given it.

The Administrator in seeking to inspect petitioner's records, was performing the same functions as the King's messengers whose use of writs of assistance furnished the background for the adoption of the Fourth Amendment. The subpoena *duces tecum* was not issued in aid of any of those newer administrative functions, quasi-legislative and quasi-judicial in character, which have developed out of present-day needs for expert application of general rules to special and complex situations of fact. Whether a different set of facts would require the same or a different answer, need not and should not be considered here.

No case cited by the opinion of the Circuit Court of Appeals upholds the exercise of such a power of compulsory inspection in aid of law enforcement activities alone. In this lies the novelty and importance of the decision.

Summary of Argument.

A. The decision of the Circuit Court of Appeals interprets Section 9 of the Federal Trade Commission Act in a manner in conflict with the prior interpretations of this section by this court and other courts, and in conflict with rules of construction recognized by this court and other courts.

B. The decision of the Circuit Court of Appeals in holding that a law enforcement officer charged with the duty of policing an act may constitutionally be given the power to compel the production of private papers for routine scrutiny directly conflicts with the literal prohibitions of the Fourth Amendment and with the reasoning of prior decisions of this court.

C. The decision of the Circuit Court of Appeals conflicts with the prior decision of this court in *Fed. Tr. Com.* v. *American Tobacco Co.*, in holding that the same principles may apply to the records of all businesses in interstate commerce as apply to the inspection of the books and records of common carriers by the Interstate Commerce Commission.

D. The decision of the Circuit Court of Appeals, in holding that records may be subjected to a subpoena *duces tecum* without a prior determination whether they are covered by the regulatory statute, conflicts with prior decisions of this and other courts.

ARGUMENT.

POINT A

The decision interprets Section 9 of the Federal Trade Commission Act in a manner in conflict with the prior interpretation of this section by this Court and other Courts.

The power of the Administrator to issue a subpoena *duces tecum* derives solely from Section 9 of the Federal Trade Commission Act (R. 3), and from no other statutory provision. That section permits the Administrator "access to * * * documentary evidence" either by requesting a district court to enforce a subpoena *duces tecum*, or by asking the Attorney General to petition a district court for a mandamus. The use of a subpoena *duces tecum* or the alternative remedy of mandamus under this section is limited by the word "evidence". Not all papers may be subpoenaed; only papers which are "evidence" are subject to the writ.

This Court has already passed directly on the meaning of this precise limitation. In *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, the remedy of mandamus was requested. The opinion was specific:

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it." (At p. 306 of 264 U. S.)

In the present case, the Circuit Court of Appeals has given the Administrator access to all the documents in order to see if they contain evidence without requiring

him to show grounds for supposing that the documents contain it. The Circuit Court of Appeals, in direct defiance of the holding in the *American Tobacco Co.* case (to which it does not advert at all in that portion of its opinion which deals with the intent of Congress) held:

> "We are of the opinion that the terms of the Act necessarily indicate a legislative intent that the exercise of the investigatory powers of the Administrator be in no degree conditioned upon the existence of reasonable cause for the Administrator to believe that the industry (*sic*), which is the subject of investigation, is violating the Act." (R. p. 252)

This holding is, we submit, in direct conflict with the prior interpretation by this Court of Section 9 of the Federal Trade Commission Act.

Similarly, the holding conflicts with other decisions under the same statutory provision requiring the establishment through judicial hearing of grounds for the issuance of a subpoena *duces tecum*:

Fed. Tr. Com. v. *Baltimore Grain Co.* (D.C., Md.), 284 Fed. 886, 889, affirmed by memorandum, 267 U. S. 586;

Fed Tr. Com. v. *Smith* (D.C., S.D., N.Y.), 34 Fed. (2d) 323, at pp. 324 and 325;

or of grounds for the employment of the alternative remedy of mandamus:

Fed. Tr. Com. v. *Claire Furnace Co.*, 274 U. S. 160 at p. 174;

Fed. Tr. Com. v. *Maynard Coal Co.* (C. of A., D. of C.), 22 Fed. (2d) 873 at p. 875.

The decision of this Court in the *American Tobacco Company* case interpreting Section 9 of the Federal Trade Commission Act antedates the enactment of the Fair Labor Standards Act of 1938 which made the provisions

of Section 9 applicable to the "jurisdiction, powers and duties" of the Administrator. The decision of the Circuit Court of Appeals thus conflicts with the usual canon of construction which assumes that Congress, in reenacting a statute, adopts the judicial construction previously given it.

The decision of the Circuit Court of Appeals also offends against another rule of construction adopted by the Courts: Whenever a statute is passed authorizing the issuance of process to compel the production of private records, the Courts will read into such statute the requirement that reasonable cause be shown, even though the statute omits to include such a requirement in those it enumerates. Such was the decision in *Schencks* v. *U. S.* (C. of A., D. of C.), 2 Fed. (2d) 185, at p. 187; *Wagner* v. *U. S.* (8th Cir.), 8 Fed. (2d) 581 at p. 585; and *Woods* v. *U. S.* (4th Cir.), 279 Fed. 706 at p. 710.

Another passage from the *American Tobacco* decision is applicable here:

> "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."
>
> *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298 at p. 307.

The opinion of the Circuit Court of Appeals admits the importance of the question in this case to the administration of the Fair Labor Standards Act. The record discloses the serious burden which would be imposed upon employers by the interpretation given the laws by the Circuit Court of Appeals. Because of the wide incidence of the Act, the opinion of the Circuit Court of Appeals raises a very serious question of Federal law in apparent conflict with previous decisions of this Court and other Courts.

POINT B

The decision of the Circuit Court of Appeals in holding that a law enforcement officer charged with the duty of policing an act may constitutionally be given the power to compel the production of private papers for routine scrutiny directly conflicts with the literal prohibitions of the Fourth Amendment and with the reasoning of prior decisions of this Court.

The Fourth Amendment contains both a general guarantee:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated"

and a specific application of the general guarantee:

> "and no warrants shall issue but upon probable cause . * * * "

The two portions of the Amendment—the general and the specific—mutually assist in the interpretation of its intent. These general considerations have these corollaries:

(1) The Courts have considered subpoenas *duces tecum* to be the equivalent of search warrants. Subpoenas *duces tecum* therefore fall within the specific constitutional requirement that probable cause be shown.

A subpoena *duces tecum* when used by a law enforcement officer, as distinct from a grand jury or court, is functionally identical with a search warrant.

In the opinion of the District Court, affirmed by this Court in *Fed. Tr. Com.* v. *American Tobacco Co.,* 264 U. S. 298, occurs a passage specifically applying to a request for mandamus under Section 9 of the Federal Trade Com-

mission Act the same tests as applied to "other warrants of law, such as a subpoena *duces tecum*".

sub nom. *Fed. Tr. Com.* v. *P. Lorillard Co.*, 283 Fed. 999, at p. 1006.

Certainly those who proposed our Bill of Rights, conscious as they were of the dangers to which they had been exposed under the obnoxious writs of assistance, did not intend by the use of the term "warrant" to limit the requirement of probable cause to writs technically so entitled, and to permit the evasion of the Fourth Amendment by a trick of nomenclature.

We submit, therefore, that the decision of the Circuit Court of Appeals is directly opposed to the obvious intent of that portion of the Fourth Amendment which requires a showing of probable cause before warrants may issue.

(2) The Courts have held that the requirement of probable cause is included within the concept of reasonableness in the general guarantee of the Fourth Amendment so as to require a showing as to probable cause in order to justify searches and seizures in the absence of warrants.

If for some reason a subpoena *duces tecum* be not considered a "warrant" within the specific provisions of the Fourth Amendment, nevertheless the essence of the requirement of probable cause is retained by the general prohibition of "unreasonable" searches and seizures.

This is the necessary logic of those decisions which hold that arrests or seizures of the person without a warrant are improper under the Fourth Amendment unless probable cause be shown:

Garske v. *U. S.* (8th Cir.), 1 Fed. (2d) 621, and cases there cited.

This is equally the necessary logic of those cases which hold as did *U. S.* v. *Lefkowitz,* 285 U. S. 452, that:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained." (285 U. S. at p. 464)

A subpoena *duces tecum* should not be given a greater scope, in the hands of a law enforcement officer, than a search warrant issued after judicial examination into the existence of probable cause. Yet even a search warrant, so issued,

> "* * * may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. * * *"
>
> *Gouled* v. *U. S.,* 255 U. S. 298, at p. 309.

The distinction is between probable cause to suspect that a certain record is an instrumentality of crime, and mere probable cause to believe that a search through papers will disclose some evidence. The concept of a hunt *through papers* as distinct from a search on premises for *a specific paper* has thus always been held within the prohibitions which the Fourth Amendment places upon the activities of policing officials.

We submit that the decision of the Circuit Court of Appeals that the Administrator, functioning as a law-enforcing officer, is under no such constitutional limitations as other police officers is directly opposed to the reasoning of this and other Courts in the cases cited above.

(3) In holding that a law enforcement officer or agency may be given the right to make routine searches of private papers, the decision of the Circuit Court of Appeals is in conflict with the reasoning of this Court in *Fed. Tr. Com.* v. *American Tobacco Co.*

In *Fed. Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298, the Commission (which had many functions) sought in its capacity as a law enforcement agency to discover whether the records of two businesses contained evidence of "the possible existence of practices in violation of Section 5" of the Federal Trade Commission Act (264 U. S. at p. 305). The claim made by the Federal Trade Commission was strikingly similar to that of the Administrator, and was characterized by this Court as a claim of "an unlimited right of access to the respondents' papers" (264 U. S. at p. 305)—that is, to all papers that might contain evidence of such a violation of law unlimited by the necessity of showing pre-existing grounds for supposing them to contain such evidence. Before turning to the question of statutory interpretation, this Court said of the implications of such a claim in the light of the Fourth Amendment:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions in the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." (264 U. S. at pp. 305 and 306)

The decision of the Circuit Court of Appeals would permit "fishing expeditions" in the exact sense of the phrase thus employed by this Court: searches through private papers without more than a possibility that evidence of an offense will be uncovered.

POINT C

The decision of the Circuit Court of Appeals conflicts with the prior decision of this Court in *Fed. Tr. Com.* v. *American Tobacco Co.*, in holding that the same principles may apply to the records of all businesses in interstate commerce as apply to the inspection of the books and records of common carriers by the Interstate Commerce Commission.

This Court said, in the *American Tobacco* case:

> "The mere fact of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be." (264 U. S. at p. 305)

Despite this flat statement, the Circuit Court of Appeals said:

> "* * * When Congress, in the exercise of its power under the commerce clause, has created an administrative agency with power to regulate and supervise the conduct of an industry and has authorized such administrative agency to inspect books and records for the purpose of enabling the agency to perform its functions under the Act, the same principles that have been applied to inspection of books and records by the Interstate Commerce Commission are applicable to inspections by such other administrative agency." (R. 254)

This passage illustrates again the failure of the Circuit Court of Appeals to distinguish between demands for information in aid of a rule-making or regulatory power and demands for information in aid of law enforcement. Demands for information in aid of a quasi-legislative function may raise problems under the Fourth Amendment, but we are not confronted with those problems in this case.

A great danger lies in the repudiation by the Circuit Court of Appeals of the passage quoted from the *American Tobacco* case.

The theory has been advanced that the records of certain businesses which are public agencies belong to the public and not to the businesses, and hence are "public records" and not "private papers" within the protection of the Fourth Amendment:

> "If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.'"
>
> (*Smith* v. *Interstate Commerce Commission*, 245 U. S. 33 at p. 43)

The passage of the *American Tobacco* decision just quoted was written in answer to an effort to extend this theory, as is demonstrated by its citation of the *Smith* case; and consequently repudiates any extension of the theory to the records of a non-public business.

The Circuit Court of Appeals argues that any business which, in its activities, substantially affects interstate commerce is consequently so "affected with a public interest" as to justify federal regulation (R. 256). The Circuit Court of Appeals thus dangerously confuses the concept of "affected with a public interest" sufficient to justify regulation, with the concept of a business operated as a public agency, whose records consequently belong to the public.

Records are either "private papers" protected by the Fourth Amendment or "public records" which are not.

The problem here is one of kind and not of degree. If the Circuit Court be correct, the protection of the Fourth Amendment is removed from all records of all individuals and corporations conducting businesses which affect interstate commerce. Such a rule would practically nullify one of the most important safeguards established by the Bill of Rights.

The reasoning of the Circuit Court of Appeals is thus in direct conflict, not only with the statement of this Court already quoted from the *American Tobacco* decision, but also with the references in that case to the records demanded as "private papers" (264 U. S. at p. 306).

POINT D

The decision of the Circuit Court of Appeals, in holding that records may be subjected to a subpoena *duces tecum* without a prior determination whether they are covered by the regulatory statute, conflicts with prior decisions of this and other Courts.

The Circuit Court of Appeals brushes aside, in the last two paragraphs of its opinion (R. 260-261) a problem of considerable importance, both from the standpoint of statutory interpretation and from the standpoint of constitutional theory. The opinion says:

> "Respondent insists that the subpoena was unreasonable because the records required would include records of employees not entitled to the benefits of the Act." (R. 260)

The opinion does not point out that these employees fall into two classes:

1. employees not engaged in interstate commerce and hence outside the scope of the Act,
2. employees whose work falls within specific statutory exemptions. (R. 48)

The opinion seems to overlook the first class entirely, for it reasons, first, that the Administrator "must determine for himself, in the first instance, whether an employee * * * is one entitled to the Act's benefits" (R. 261) and, second, that:

> "To make proper and effective regulations the Administrator is entitled to full information respecting the character and basis of voluntary classification by the employer." (R. 261)

The second reason involves the erroneous assumption that the Administrator was here seeking information in aid of his rule-making powers, whereas he made no such claim in his application to the District Court (R. 2-9). The first reason, by assuming that the Administrator, as a law-enforcement officer, is entitled to compel the production of papers to determine whether they are relevant to the enforcement of the Act, conflicts both with this Court's interpretation of Section 9 of the Federal Trade Commission Act, and with the interpretation of the Fourth Amendment which the opinion of the Circuit Court of Appeals itself adopts.

Construing Section 9, this Court said in *Fed Tr. Com.* v. *American Tobacco Co.*, 264 U. S. 298:

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection."
>
> (Here the *American Tobacco* case exactly parallels the present case, as is shown by petitioner's answer in the District Court, at 48 of the Record.)
>
> "We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to

> produce such papers as they conceived to be relevant to the matter in hand. If their judgment upon that matter was not final, *at least some evidence must be offered to show that it was wrong.*" 264 U. S. at p. 307—italics added.

Fed. Tr. Com. v. *Claire Furnace Co.*, 274 U. S. 160, also involved the same issue of a mixed demand for information "revealing the intimate details of every department of the business, both intrastate and interstate" (274 U. S. at p. 167). This Court denied an injunction on the ground that upon the hearing for mandamus

> "* * * the defendant therein would have been fully heard, and could have effectively presented every ground of objection sought to be presented now." (274 U. S. at p. 174)

The same rule was announced as to the alternative remedy of subpoena *duces tecum* in *Fed. Trade Com.* v. *Smith* (D. C., S. D., N. Y.), 34 Fed. (2d) 323, at p. 325.

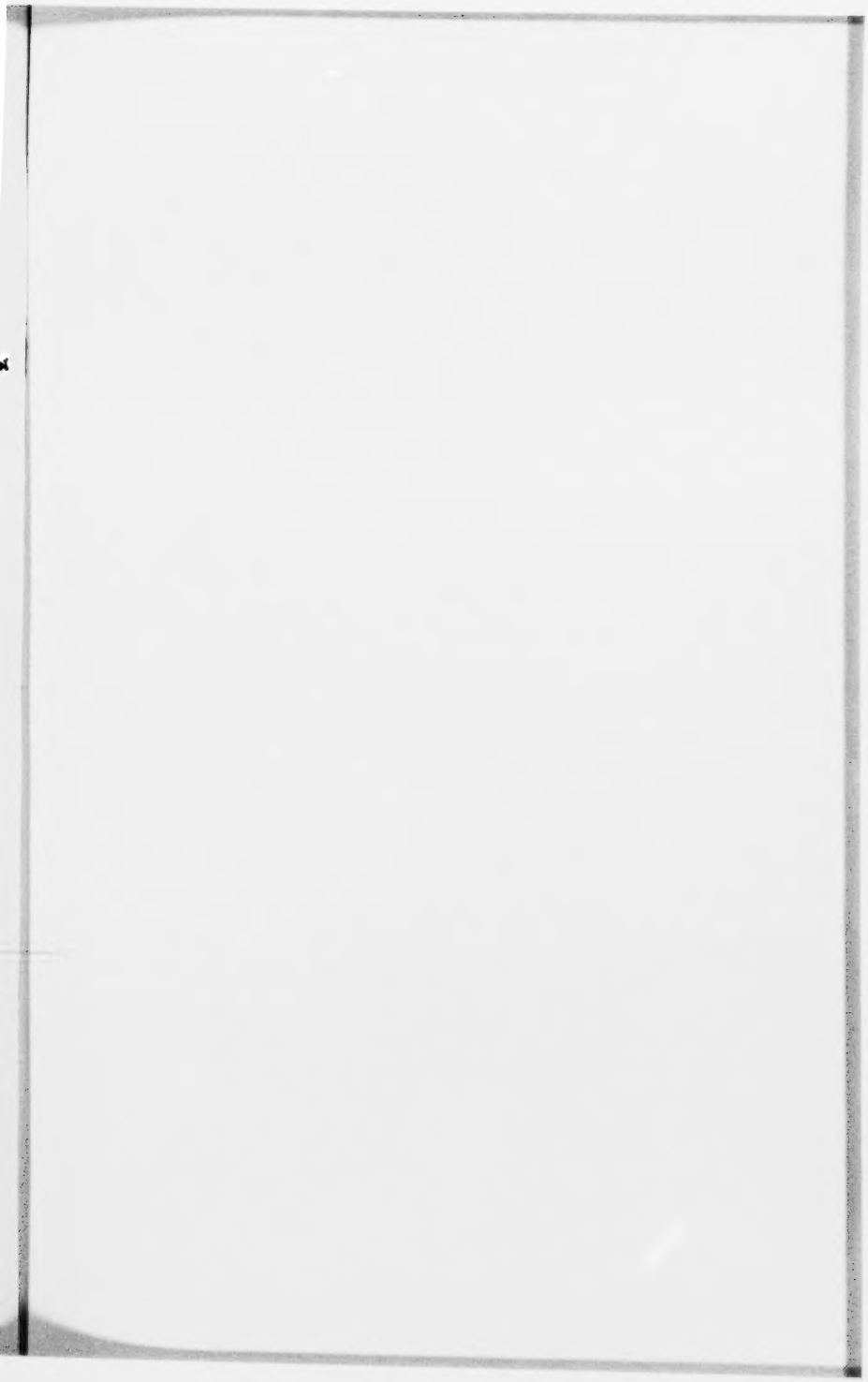
As the opinion of the Circuit Court of Appeals admits:

> "* * * the Government may not demand unlimited access to all the corporation records, whether relevant or irrelevant to the subject of inquiry or investigation." (R. 258)

We submit that records pertaining to employees not covered by the Act are clearly irrelevant to any inquiry whether the petitioner has violated the Act, and hence are, upon constitutional principle and the precedents, not subject to search by subpoena *duces tecum*. We submit that the decision of the Circuit Court of Appeals on this point is obviously and directly in conflict with the prior decisions of this Court.

Respectfully submitted,

STUART S. BALL,
Counsel for Petitioner.



APPENDIX.

Sections 9 and 10 of the Federal Trade Commission Act, Act of September 26, 1914, c. 311, Section 9, 38 Stat. 722; 15 U. S. C., Secs. 49 and 50.

"SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidences, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty, or forfeiture for or on account of any transaction, matter, or thing con-

cerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

"SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall wilfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall wilfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall wilfully remove out of the jurisdiction of the United States, or wilfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall wilfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than

$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

Federal Fair Labor Standards Act of 1938

Act of June 25, 1938, c. 676, Sections 1-19, 52 Stat. 1060-1069; 29 U. S. C., Sections 201-219.

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which

the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by

and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause

to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar-cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements

negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effec-

tiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his find-

ings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforce-

ment of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in

an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell-

fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee em-

ployed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the

regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection ex-

cept for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established

under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 407

MONTGOMERY WARD & CO., INCORPORATED,
PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 215) is reported in 30 F. Supp. 360. The opinion of the Circuit Court of Appeals (R. 248) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 17, 1940 (R. 262). The petition

for a writ of certiorari was filed September 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 11 (a) of the Fair Labor Standards Act of 1938 authorizes the Administrator of the Wage and Hour Division of the United States Department of Labor to make routine inspections of employers' records containing information as to the wages paid to and hours worked by their employees.

2. Whether the Fourth Amendment limits the authority to make inspections conferred upon the Administrator by Section 11 (a) of the Act to instances where he has information tending to show that the employer has violated the Act.

3. Whether the Administrator's authority to inspect records material to his investigation may be defeated on the ground that such records include information relating to some employees who may not be covered by the Act or who may be excepted therefrom by specific exemptive provisions.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Supp. V, Title 29, Sec. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717;

U. S. C., Title 15, Secs. 49 and 50), certain provisions of which are made applicable to the jurisdiction, powers and duties of the Administrator by Section 9 of the Fair Labor Standards Act, are set forth in full in the appendix to the petition and supporting brief, pages 25–49.

STATEMENT

In April 1939, pursuant to the provisions of Section 9 of the Fair Labor Standards Act,[1] the Administrator of the Wage and Hour Division of the United States Department of Labor instituted this proceeding in the District Court to require petitioner to produce before the Administrator or an officer of the Wage and Hour Division designated by him certain records described in an administrative subpoena *duces tecum* previously directed to petitioner by the Administrator.[2]

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[1] By Section 9 of the Fair Labor Standards Act the provisions of Sections 9 and 10 of the Federal Trade Commission Act "relating to the attendance of witnesses and the production of books, papers, and documents" are "made applicable to the jurisdiction, powers, and duties of the Administrator". Section 9 of the Federal Trade Commission Act empowers the Commission "to require by subpoena the attendance and testimony of witnesses and the production of * * * documentary evidence relating to any matter under investigation", and gives the district courts jurisdiction to require obedience to subpoenas issued by the Commission.

[2] An identical subpoena *duces tecum* was directed to Stuart S. Ball, secretary of petitioner (R. 44–45), and the Administrator's application to the District Court named him as a respondent and requested enforcement of the sub-

The verified application of the Administrator (R. 1–9) alleged that petitioner is engaged in a nation-wide general merchandising business and employs employees engaged in interstate commerce and in the production of goods for such commerce, within the meaning of the Act (R. 3–4); that during the course of an investigation of petitioner's Kansas City, Missouri, mail order house, petitioner refused to permit inspectors of the Wage and Hour Division to examine its records relating to the wages paid to and hours worked by the employees employed there (R. 4–5); that the Administrator thereupon issued an order for investigation, reciting that he had reasonable grounds to believe that petitioner had violated certain provisions of the Act, and directing that an investigation be made to determine whether it had (R. 5, 40–42); that thereafter the subpoena *duces tecum* in question was issued and served upon petitioner (R. 5, 43); that upon the return date of the subpoena petitioner appeared but refused to produce the records demanded and instead filed a motion to quash the subpoena (R. 6); that the Administrator thereafter denied petitioner's motion, but that notwithstanding this petitioner persisted in its refusal to produce the records (*ibid.*). The application further alleged that petitioner's refusal to produce the records demanded by the subpoena impeded the prog-

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poena as to him (R. 2–9). The final order of the District Court dismissed the application as to Ball (R. 227).

ress of the Administrator's investigation and that the records were material, necessary, and appropriate to determine whether petitioner had violated any of the provisions of the Act (R. 7–8).

The Administrator's subpoena, a copy of which was attached to the application, demanded the production (1) of petitioner's " 'Gross Earnings Report' containing entries as to the wages paid" to its Kansas City mail order house employees during the period from the week ending October 27, 1938,[3] to April 11, 1939, "together with the supporting timeclock cards" of such employees, and (2) of "Records showing number of hours scheduled" for each department of the Kansas City house during the same period and "the number of hours actually worked" by each department (R. 43). In his application, however, the Administrator, relying upon petitioner's assurance that it did not have a record of hours actually worked by the departments of the Kansas City house, did not ask for the production of such records (R. 8).

Petitioner replied, in the form of an "answer" to the application (R. 47–110), admitting the allegations of the application with respect to its employment of employees engaged in interstate commerce and in the production of goods for such commerce and its refusal to produce the records demanded by the Administrator's subpoena (R.

[3] The Act became effective October 24, 1938 (Sections 6 (b), 7 (d), 15 (a)).

47), denying that the records demanded by the subpoena were relevant to the Administrator's investigation (R. 48, 52) and that the Administrator had reasonable grounds to believe that petitioner had violated the Act (R. 51–52), and alleging affirmatively that it had, before and after the issuance of the subpoena, offered to make available to the Administrator "all record information relative to any complaint which had been made" (R. 49–50). Petitioner also alleged that the subpoena constituted an unreasonable search and seizure within the meaning of the Fourth Amendment (R. 52–55).[4]

The Administrator filed a reply to petitioner's "answer" in which he denied that petitioner had offered to produce records relative to complaints of violations of the Act and alleged that the only offer petitioner had ever made was to produce records regarding employees whom petitioner had classified as executive and administrative employees and as to whom petitioner had admittedly violated the Act and the Administrator's regulations defining such employees (R. 111–114).[5]

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[4] Petitioner's "answer" concluded with allegations that the Fair Labor Standards Act is unconstitutional in several respects (R. 55–58). These contentions were abandoned on the appeal. (See R. 249.)

[5] Section 13 (a) (1) of the Act excepts from the wage and hour provisions of Sections 6 and 7 "executive" and "administrative" employees, "as such terms are defined and delimited by regulations of the Administrator". The Ad-

At the outset of the hearing before the District Court petitioner objected that the court should not hear argument upon the application and the order to show cause (R. 46) without first requiring the Administrator to adduce evidence to show that he had reasonable grounds to believe that petitioner had violated the Act and affording petitioner an opportunity to adduce evidence in rebuttal (R. 157–159). The court overruled this objection (R. 159), but granted petitioner permission to make written offers of proof (R. 163). Petitioner filed such offers (R. 168–170, 172–180, 192–194, 196–198), which were designed to show that petitioner had not violated the Act and that the Administrator had no reasonable grounds to believe that it had. The Administrator filed objections thereto (R. 170–172, 180–192, 194–195, 198–199), mainly on the ground that the proffered evidence was not pertinent to the determination of the application.

The order of the District Court sustained the Administrator's objections to petitioner's offers of proof and ordered petitioner to produce before the Administrator's representatives all the records described in the Administrator's subpoena *duces tecum* except records showing the number of hours actually worked by the departments of petitioner's Kansas City mail order house (R. 226–229). In

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ministrator had previously issued regulations defining and delimiting those terms (Title 29, ch. V, Code of Federal Regulations, Part 541).

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its memorandum opinion (R. 215–226) the court held that "Congress had power to require the keeping of the records and that the Administrator may, at his pleasure, require the production of such records" (R. 221).

The Circuit Court of Appeals affirmed the order of the District Court (R. 248–259), holding that under the Act the Administrator's authority to make inspections is "in no degree conditioned upon the existence of reasonable cause for the Administrator to believe that the industry, which is the subject of investigation, is violating the Act" (R. 252), and that the Fourth Amendment does not so limit the Administrator's authority.

Inasmuch as both lower courts stayed the enforcement of their orders pending appeal (R. 264), the preliminary investigation to determine whether petitioner has complied with the Act has thus far been delayed about eighteen months.

ARGUMENT

I

THE FAIR LABOR STANDARDS ACT AUTHORIZES THE ADMINISTRATOR TO MAKE ROUTINE INSPECTIONS WITHOUT FIRST PROVING THAT HE HAS REASON TO BELIEVE THAT THE EMPLOYER INSPECTED HAS VIOLATED THE ACT

The source of the Administrator's power of inspection is Section 11 (a) of the Fair Labor Standards Act, which provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other con-

> ditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *

In addition, Section 11 (c) requires every employer subject to the substantive provisions of the Act to make, keep, and preserve such records of the hours and wages of persons employed by him as shall be prescribed by administrative regulation. The power to inspect granted in these provisions is implemented by Section 9, which provides that "For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act * * * are hereby made applicable to the jurisdiction, powers, and duties of the Administrator * * *."

Petitioner contends that these provisions authorize the Administrator to inspect and subpoena the records of only those employers whom he has probable cause to believe have violated the statute. But the purpose of these provisions, as Section 11 (a) indicates, was to enable the Administrator "to de-

termine whether *any person* has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." The general scope of these provisions and the reference in the statute to "any person" are hardly consistent with an intention to limit the right to inspect to employers as to whom evidence has already been obtained. Furthermore, since a showing of probable cause is obviously not a prerequisite to the filing of reports, the use of substantially identical language in Section 11 (c) [6] shows that no such limitation is imposed upon the Administrator's power to inspect. The statute was thus plainly intended to permit the Administrator to make routine inspections of an employer's wage and hour records, irrespective of prior information as to specific violations.

Petitioner does not rely on any express language in the Fair Labor Standards Act (or, for that matter, in the Federal Trade Commission Act) as manifesting an intention to the contrary, but claims that the decision below conflicts with an interpretation allegedly given Section 9 of the Federal Trade Commission Act in *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298.[7]

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[6] Section 11 (c) requires the keeping of such records and the making of such reports as the Administrator shall prescribe "as necessary or appropriate for the enforcement of the provisions of this Act * * *."

[7] Petitioner also cites *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886 (D. Md.), aff'd, mem., 267

But that case arose under the clause in Section 9 of the Trade Commission Act giving to the Commission "access to, * * * and the right to copy any documentary evidence of any corporation being investigated or proceeded against." The issue was whether the language quoted gave the Commission "unlimited right of access" to corporate papers, as it claimed (264 U. S., at 305).

The Fair Labor Standards Act incorporates only those provisions of Section 9 of the Trade Commission Act "relating to the attendance of witnesses and the production of books, papers, and documents," not that giving administrative officials sweeping access to the papers of corporations. It was unnecessary to incorporate the latter power, inasmuch as its equivalent, narrowly confined to material pertinent under the Fair Labor Standards Act, is found in Section 11 (a) of the latter Act, which expressly authorizes the Administrator to inspect records necessary to determine whether any person has violated the Act. Since the Administrator's power to inspect is derived from Section 11 (a) and not from the Trade Commission Act, the decision interpreting the broad language of the latter statute is not applicable, and the al-

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U. S. 586, and *Federal Trade Commission* v. *Smith*, 34 F. (2d) 323 (S. D. N. Y.), but these merely followed the *American Tobacco* decision. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, and *Federal Trade Commission* v. *Maynard Coal Co.*, 22 F. (2d) 873 (App. D. C.), which are also claimed to conflict with the decision below, were decided on grounds having no relation to the issue here.

ledged conflict in statutory construction between the decision below and the *American Tobacco* case disappears.

The vice in the subpoena at issue in the *American Tobacco* case was that it was not limited to documents which would be material or relevant, but extended to substantially all of the respondent's papers. The Court's repeated advertence to the absence of any showing of relevance or materiality in the papers subpoenaed and its approval of an earlier decision [8] on the ground that the requirement there was limited to documents "relevant to the inquiry" show that the basis of the decision was not the absence of probable cause to suspect a violation of law, but the failure to limit the subpoena to papers from which it could be determined whether a violation had occurred.[9] Inasmuch as the subpoena here is restricted to papers which will show the wages paid and the hours worked, the facts most relevant in any inquiry under the Fair Labor Standards Act, the difference between the two cases is patent. Thus even if it be assumed that similar statutory provisions were involved, the *American Tobacco* case is plainly distinguishable.

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[8] *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.

[9] The statement upon which petitioner relies that "Some ground must be shown for supposing that the documents called for do contain" evidence (264 U. S., at 306), when read in its context, means merely that there must be reasonable ground for believing the documents to be relevant, not that, before seeing the evidence, there must be reasonable ground for believing respondent guilty.

Petitioner argues that the Act must be construed in the manner for which it contends so as to avoid violation of the Fourth Amendment. But that Amendment is not applicable. See Point II, *infra*.

II

THE FOURTH AMENDMENT DOES NOT LIMIT THE ADMINISTRATOR'S RIGHT OF INSPECTION TO INSTANCES WHERE HE HAS REASON TO BELIEVE THAT THE EMPLOYER HAS VIOLATED THE ACT

This Court has repeatedly sustained the power of Congress to authorize administrative officials to inspect records and require the production of documents as an incident to the effective enforcement of regulatory statutes. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 473; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Hale* v. *Henkel*, 201 U. S. 43; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Bartlett Frazier Co.* v. *Hyde*, 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654; *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419; *United States* v. *Louisville & N. R. Co.*, 236 U. S. 318; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 174–175; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *United States* v. *Katz*, 271 U. S. 354.

Petitioner urges that the Fourth Amendment [10] requires as a prerequisite to such action a showing

[10] The Fourth Amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

of reasonable cause to suspect a violation of the regulatory statute. But none of the many cases upholding the investigatory powers of administrative agencies against attack under the Fourth Amendment contain even a suggestion of such a limitation. The point here raised was specifically rejected in *Bartlett Frazier Co.* v. *Hyde*, 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654, where it was held that the provisions of the Grain Futures Act (42 Stat. 998, U. S. C., Title 7, Secs. 1–17), authorizing inspection of records by representatives of the Secretary of Agriculture, did not violate the Fourth Amendment. The Circuit Court of Appeals there declared that the "statutory purpose of preventing corners and speculation in grains * * * would be seriously embarrassed if the government were powerless to require the information without regard to whether traders such as appellants were suspected of, or charged with, breaking the law. Indeed, the very requirement of the information would of itself have tendency to discourage the unlawful manipulations at which the act is aimed" (65 F. (2d), at 352). On application for a writ of certiorari, petitioners contended that the holding that they were subject to "an unqualified duty to report and the untrammeled right of inspection" (65 F. (2d), at 352) conflicted with the *American Tobacco*

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and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

decision and that the Grain Futures Act, so construed, violated the Fourth Amendment. (See petion and supporting brief in No. 267, October Term, 1933.) This Court denied the petition. *Bartlett Frazier Co.* v. *Wallace,* 290 U. S. 654.

Petitioner's argument that the Fourth Amendment is contravened if the purpose of an investigation is to discover, without prior showing of probable cause, whether or not a law has been violated was rejected in *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 622, which upheld the power of the Commission to require reports under the Hours of Service Act. The purpose of the reports there required was to ascertain whether the law had been obeyed. This Court declared:

> There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the Fourth and Fifth Amendments of the Constitution of the United States.
>
> The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

Here again petitioner's chief reliance is upon *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298. We have already endeavored to show (*supra,* pp. 10–12) that that decision is not applicable here. The issue there was

the scope of the subpoena, not the existence of reasonable cause to suspect violation of the statute, and the Court's remarks with respect to the Fourth Amendment must be read with that in view.

The cases establish that, as applied to the regulatory investigations of administrative agencies, the Fourth Amendment requires only that a demand for the production of documents must be reasonably specific and limited to documents which might be relevant to the inquiry. See *Wilson* v. *United States*, 221 U. S. 361, 372, 375–376; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comsion, supra; Hale* v. *Henkel*, 201 U. S. 43, 76–77; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 476, 497. This limitation is derived from the guarantee against unreasonable searches and seizures. Petitioner attempts to invoke the provision of the Amendment that "no warrants shall issue, but upon probable cause". As the cases cited by petitioner show,[11] this relates to criminal proceedings, and has never been applied where there has been express statutory authority to inspect records for administrative purposes. Cf. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission, supra; Bartlett Frazier Co.* v. *Hyde, supra.*

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[11] *Garske* v. *United States*, 1 F. (2d) 621 (C. C. A. 8th); *United States* v. *Lefkowitz*, 285 U. S. 452; *Gouled* v. *United States*, 255 U. S. 298; *Schencks* v. *United States*, 2 F. (2d) 185 (App. D. C.); *Wagner* v. *United States*, 8 F. (2d) 581 (C. C. A. 8th); *Woods* v. *United States*, 279 Fed. 706 (C. C. A. 4th).

III

THE ADMINISTRATOR'S RIGHT OF INSPECTION IS NOT LIMITED TO THE RECORDS OF THOSE EMPLOYEES WHOM PETITIONER BELIEVES TO BE SUBJECT TO THE ACT

Although petitioner admits that it is in interstate commerce and that some of its employees are subject to the Act, it claims that the Administrator's investigatory powers are limited to such employees and that any subpoena which requires it to produce records for all its employees is unlawful.[12]

But it is well settled that investigatory bodies are not restricted in their inquiries to transactions which might be or are subjected to affirmative regulation. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214–216; *Electric Bond and Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Bartlett Frazier Co.* v. *Hyde, supra; Newfield* v. *Ryan,* 91 F. (2d) 700 (C. C. A. 5th), certiorari denied, 302 U. S. 729; *United States* v. *Clyde S. S. Co.,* 36 F. (2d) 691 (C. C. A. 2d), certiorari denied, 281 U. S. 744. Thus in the *Goodrich* case it was held, over objection, that the Interstate Commerce Commission could require reports as to the operation of a local

[12] Petitioner claims that some of the employees are covered by specific statutory exemptions and that others are engaged in intrastate commerce. The Act, of course, applies to many employees not engaged *in* interstate commerce. See Secs. 6, 7, 3 (j).

amusement park owned by a carrier. The Court recognized that the Commission must have power to acquire information as to such matters "so as to enable it to properly regulate the matters which are within its authority" (224 U. S., at 216).

Petitioner's argument is that each employer can determine in advance which of his employees are subject to the Act and give to the Administrator information only as to such employees. But if the Act is to be effectively enforced, the Administrator must have the power to make his own investigations. It often cannot be known in advance which employees are covered by the Act and which are exempt, and it is not possible for the Administrator to ascertain whether petitioner is "complying with the law, without a complete knowledge of what it was doing" (*United States* v. *Clyde S. S. Co., supra,* at 693). To permit the employer to determine for himself which records he will make available for inspection would halt the Administrator's investigation at the threshold and seriously impair the enforcement of the Act. The court below was clearly correct in holding that the Administrator "is not required to accept respondent's classification of employees" (R. 261).

CONCLUSION

Although this case does present an important question of law, the decision below is clearly in accord with prior decisions of this Court involving similar questions under other statutes. Nor is

there any conflict of decisions in the lower courts. By objecting to the Administrator's power to inspect and by opposing the issuance of the subpoena, petitioner has already delayed for eighteen months the making of a preliminary investigation as to whether it has complied with the Act. In these circumstances it is respectfully submitted that the petition for certiorari should be denied.

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